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PRISONS AND CORRECTIONS FORUM

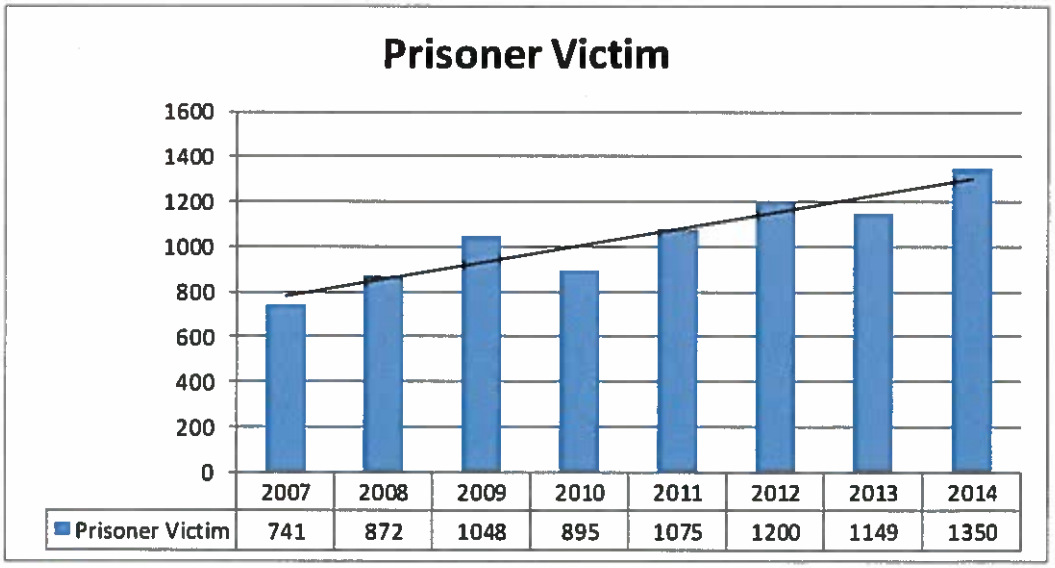
A Publication of the State Bar of Michigan's Prisons & Corrections Section

Contents

Assaultive Behavior in Michigan Prisons

By by Tane' Atkins, Senior Analyst, Office of Legislative Corrections Ombudsman

Over the past seven years, prisoner on prisoner violence has steadily increased within Michigan's prisons. The Office of Legislative Correction Ombudsman is concerned with this trend and is conducting research in an effort to identify the causes of this increased violence and hopefully offer some recommendations to address it.

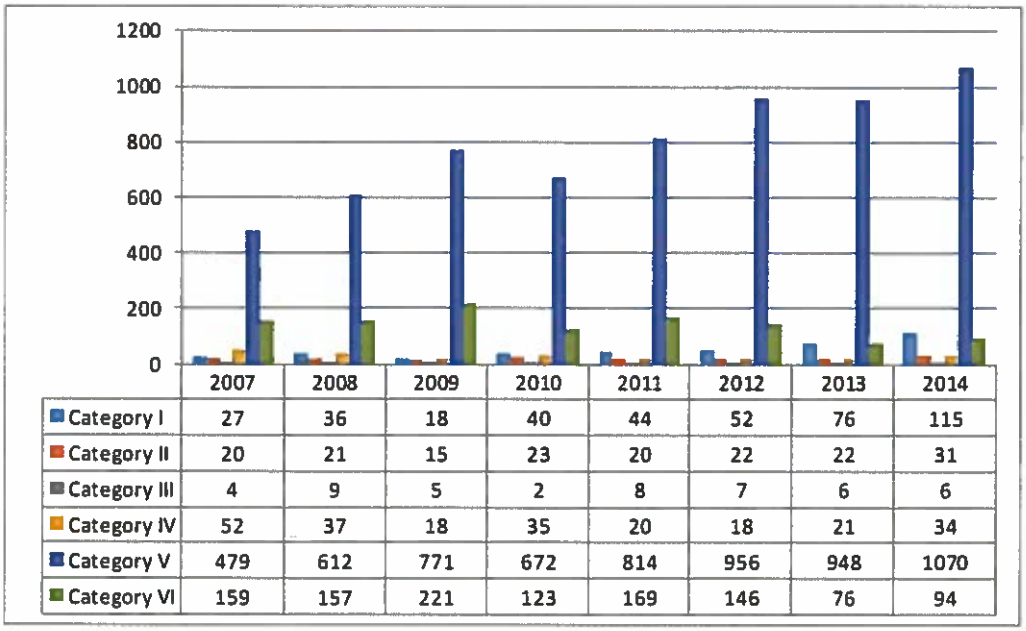


According to the number of Critical Incidents reported by the Michigan Department of Corrections (MDOC), from 2007 to 2014, assaults on prisoners increased from 741 incidents to 1,350. This growth represents an 82% increase in the number of prisoner-victim assaults statewide.

The MDOC classifies assaults into five separate categories, Category I- assault resulting in death or serious physical injury, Category II – sexual assault with penetration, Category III – sexual assault without penetration but involving more than intentional non-consensual touching (e.g., use of force, attempted sexual penetration), Category IV – Sexual assault not covered in Category II or III; Category V – Assault with non-

Continued from page 1

serious physical injury; Category VI – Assault with no physical injury. The graph below shows that the majority of prisoner-victim assaults involve Category V, assault with non-serious physical injury. MDOC does not define non-serious physical injury in the policy on critical incident reporting, but does provide some clues in the prisoner discipline policy. The charge of assault and battery (less than serious physical injury) is defined as the intentional, non-consensual touching of another person done in anger or with the purpose of abusing or injuring another. Therefore, although the majority of the increase assaults involves non-serious physical injury, they still involve physical contact and have the potential to escalate through the use of weapons or infliction of serious injury which would further jeopardize the safety and security of the prison facility and should be considered serious as related to institutional behavior.



	2007	2008	2009	2010	2011	2012	2013	2014
Category I	27	36	18	40	44	52	76	115
Category II	20	21	15	23	20	22	22	31
Category III	4	9	5	2	8	7	6	6
Category IV	52	37	18	35	20	18	21	34
Category V	479	612	771	672	814	956	948	1070
Category VI	159	157	221	123	169	146	76	94

Category I, assault resulting in death or serious injury, represents a small number of the overall assaults; however, most concerning is the sharp increase in such assaults. Anecdotal claims made by MDOC staff suggest that more prisoners are being treated for slashing and stabbing injuries at Duane Waters Hospital than in the past. The number of Critical Incidents documented by the MDOC appear to support these claims. The number of Category I assaults increased from 27 in 2007 up to 115 in 2014. This increase represents a 326% increase in the number of prisoner assaults resulting in serious injury or death.

While it is too early in our research to draw strict conclusions regarding the rise in assaults state wide, conversations with MDOC employees and prisoners suggests that prisoner security classification, Security Threat Groups, and overcrowding play a role in the increase.

An Introduction To Michigan's Correctional Facility Reimbursement Act

By Raymond C. Walen, Jr.

I. History

Michigan common-law did not impose a duty of reimbursement for the cost of incarceration. *Auditor General v. Olezniczak*, 302 Mich. 336, 346-57 (1942). The duty was first created in the Prison Reimbursement Act, 1935 P.A. 253, M.C.L. § 800.401, *et seq.*, which allowed the State of Michigan to recover from prisoners the cost of imprisonment at the State Prison of Southern Michigan in Jackson, the Marquette Branch Prison, and the Michigan Reformatory in Ionia.

In 1984 the Michigan Court of Appeals held the Prison Reimbursement Act unconstitutional because it applied only to those prisoners in the three named institutions, a violation of the Equal Protection Clauses of the United States and Michigan Constitutions by employing a wholly arbitrary classification. U.S. Const., Am XIV; Mich. Const. 1963, art 1, § 2. *State Treasurer v. Wilson*, 132 Mich. App. 648 (1984). The Michigan Supreme Court reversed. *State Treasurer v. Wilson*, 423 Mich. 138 (1985). While the appeal was pending, the Legislature revised and renamed the Act as the State Correctional Facility Reimbursement Act (Reimbursement Act), 1984 P.A. 282. Effective December 20, 1984, it applies to prisoners confined in a "correctional facility" or under the continuing jurisdiction of the Michigan Department of Corrections (MDOC).

II. Overview

The Reimbursement Act requires that prisoners with sufficient assets pay the state up to 90% of their assets to defray the costs of their care in prison. It prescribes reporting, investigation, and court proceedings for its enforcement.

A. Assets

The Reimbursement Act defines "assets" as:

> [P]roperty, tangible or intangible, real or personal, belonging to or due a prisoner or former prisoner including income or payments to such prisoner from social security, worker's compensation, veteran's compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever, but does not include any of the following:
>
> (i) The homestead of the prisoner up to $50,000.00 in value.
>
> (ii) Money saved by the prisoner from wages and bonuses paid the prisoner while he or she was confined to a state correctional facility.

M.C.L. § 800.401a(a).

B. Reporting

As part of the intake process, each newly committed prisoner must complete an "Offender Financial Status Report" (Form CAJ-140) to identify his or her assets and swear or affirm that the information provided is complete and accurate; the MDOC may resubmit the form to a prisoner to update the information. M.C.L. § 800.401b. The prisoner must update the form "if it becomes known or is reasonably believed" that he or she has assets that were not previously reported. MDOC Policy Directive, PD 04.02.140, para. D.

A prisoner's failure to cooperate with the reporting requirements will be included in the prisoner's parole eligibility report, and may be considered by the parole board. *Id.*, para. E, M.C.L. § 800.403a(2).

The MDOC Director must report this asset information, any other information about each prisoner's assets, and "an estimate of the total cost of care for that prisoner," to the Michigan Attorney General. M.C.L. § 800.402, PD 04.02.140, para. F. The MDOC Deputy Director of Budget and Operations Administration, or a designee, provides the estimated cost of care. PD 04.02.140, para. I.

Corrections staff are to contact the MDOC's Office of Legal Affairs for direction if a prisoner's assets are known or reasonably believed to exceed an estimated value of $1,500 or more, or if the prisoner is receiving, on a recurring basis, assets that were not previously reported. Examples include checks or money orders sent to the prisoner, deeds, estate settlements, payroll and bank statements. *Id.* paras. G and H.

Continued from page 3

C. Investigation

The Attorney General must investigate all reports of assets filed by the MDOC and can enlist the assistance of the prosecuting attorney of the county from which the prisoner was sentenced or is located. M.C.L. §§ 800.403(1), 800.404b(1). Individuals obligated to cooperate in seeking reimbursement include the prisoner's sentencing judge, county sheriff, chief administrator of the correctional facility, and the Michigan Department of Treasury. They shall provide "all information and assistance possible" to enable the state to secure reimbursement. M.C.L. § 800.405.

D. Cost of Care

The cost of care charged to a prisoner must be separately calculated for each prisoner in every case. The Reimbursement Act defines "cost of care" as:

> [T]he cost to the department [of corrections] for providing transportation, room, board, clothing, security, medical, and other normal living expenses of prisoners, and the cost to the department for providing college-level classes or programs to the prisoners, as determined by the department.

M.C.L. § 800.401a(b).

E. Duty to File

The Attorney General must seek reimbursement if, after completing the investigation, there is good cause to believe that a prisoner has sufficient assets to recover not less than 10% of the estimated cost of care of the prisoner, or 10% of the estimated cost of care of the prisoner for two years, whichever is less. M.C.L. § 800.403(2). The Michigan Court of Appeals rejected a claim that the 10% is a jurisdictional minimum; actions by the attorney general seeking less than 10% of the cost of care are discretionary. *State Treasurer v. Cuellar*, 190 Mich.App. 464, 467 (1991), *lv. denied*, 440 Mich. 861 (1992).

F. Statute of Limitations

The state may commence proceedings under the Reimbursement Act until the prisoner has been discharged from the sentence and is no longer under the jurisdiction of the MDOC. M.C.L. § 800.404(8).

G. Filing the Complaint

The circuit courts have exclusive jurisdiction in all proceedings under the Reimbursement Act. The attorney general files a complaint in the circuit court for the county from which the prisoner was sentenced. M.C.L. § 800.404(1). The complaint must allege that the person is or has been a prisoner, there is good cause to believe the prisoner has assets, and ask that the assets be used to reimburse the state for the expenses "incurred or to be incurred, or both" by the state for the cost of the prisoner's care. M.C.L. § 800.404(1).

H. Order to Show Cause and Service

Upon filing the complaint, the court must issue an order to the prisoner to show cause why the relief requested in the complaint should not be granted. The complaint and order to show cause must be served at least 30 days before the date set for the hearing. An imprisoned defendant must be served by registered mail in care of the chief administrator of the prison; a defendant on parole must be personally served. M.C.L. § 800.404(2).

I. Appointment of a Receiver

Except for execution against a prisoner's homestead, the Attorney General my use "any remedy, interim order, or enforcement procedure allowed by law or court rule" to prevent the disposition of a prisoner's property before the hearing on the complaint and order to show cause. M.C.L. § 800.404a(1) and (3). The circuit court may appoint a receiver to "protect and maintain the assets" pending resolution of the case. M.C.L. § 800.404a(2).

If the asset involved is money in the prisoner's prison account, the warden will be appointed receiver. If the case involves money deposited in a bank, the bank may

Congratulations to our very own Barbara Levine on her appointment to the Criminal Justice Policy Commission! See Criminal Justice Policy Commission Established; Other CSG Efforts Stall in this issue.

be appointed; where an insurance company, pension fund, or some other entity is making payments to the prisoner, the entity responsible for making the payments is usually appointed.

J. Hearing

A prisoner is entitled to a hearing on the complaint and order to show cause. M.C.L. §§ 800.404(2), (3), (5) and 800.404a(1).

Potential issues at the hearing include: whether the prisoner has assets; whether those assets are exempt from the Reimbursement Act; whether the assets should be applied to support the prisoner's dependents; and the cost of care.

A sworn statement by the Michigan Department of Treasury is considered prima facie evidence of the amount due the state. M.C.L. § 800.406(2).

K. Judgment

If, at the time of the hearing, it appears to the court that the prisoner has assets which are not exempt under the Reimbursement Act, the court shall order that the assets or a portion of the assets be applied to reimburse the state. M.C.L. § 800.404(3). If the prisoner has sufficient assets, the state may recover expenses incurred or to be incurred for the entire period of incarceration. M.C.L. § 800.404(8).

The cost of investigations under the Reimbursement Act shall be paid from reimbursements secured under the Act, and the balance is to be paid to the state General Fund. M.C.L. § 800.406(1). No more than 90% of the value of the prisoner's assets may be used for securing costs and reimbursement. M.C.L. § 800.403(3).

L. Enforcing the Judgment with Contempt Proceedings

If the person, corporation, or other legal entity in possession of a prisoner's assets refuses to comply with an order under M.C.L. § 800.404(3), the court shall order the person or entity to appear before the court and show cause as to why they should not be held in contempt of court. M.C.L. § 800.404(6).

M. Appeals

The circuit court's order is appealable by right to the Michigan Court of Appeals by either party. M.C.L. § 600.308(1)(a); M.C.R. 7.203(A)(1). The claim of appeal must be filed within 21 days after entry of the judgment or 21 days after entry of an order deciding a motion for new trial, rehearing, reconsideration, or other relief from the judgment appealed from, if the motion was filed within the initial 21 day period or in further time the trial court allowed during the 21 day period. MCR 7.204(1)(1).

N. Defenses Based on the Reimbursement Act

1. *Statute of Limitations.* The state may not commence proceedings under the Reimbursement Act after the prisoner has been finally discharged from the sentence and is no longer under the jurisdiction of the MDOC. M.C.L. § 800.404(8). Thus, a claim is barred if the prisoner has "maxed out" on the sentence or has been discharged from parole.
2. *Non-Ownership of Assets.* The state may only seek assets "belonging to or due a prisoner or former prisoner." M.C.L. § 800.401a(b). Assets that belong to the prisoner's spouse or children or someone else are not subject to seizure under the Reimbursement Act. Property held jointly by the entireties (with a spouse) is not subject to seizure. M.C.L. §§ 600.2807(1) and 600.6023a.
3. *Exempted Assets.* Two classes of property are specifically not considered "assets" subject to the Reimbursement Act: (i) the prisoner's homestead property up to $50,000 in value; and (ii) money saved by the prisoner from wages and bonuses paid while confined to a state correctional facility. M.C.L. § 800.401a(a)(i)-(ii).
4. *Assets Needed to Support Dependents.* The court must take into consideration any legal or moral obligation the prisoner has to support a spouse, minor children or other dependents, and for whom the prisoner "is providing or has in fact provided support." M.C.L. § 800.404(5).
5. *Recovery Limited to the Cost of Care.* The Reimbursement Act's definition of "cost of care" is limits the amount the state may recover. M.C.L. § 800.404a(b). Even if the cost of care is not contested at the hearing, the amount of reimbursement shall not exceed "the per capita cost of care for maintaining prisoners in the state correctional facility in which the prisoner is housed." M.C.L. § 800.404(4).

Continued from page 5

6. *Exemption for Work Camp Prisoners.* The state may not seek reimbursement against the assets of work camp prisoners if the MDOC is being or has been reimbursed by the prisoner for those costs under M.C.L. § 791.265c. M.C.L. § 800.404(4).

Future installments will discuss how the Reimbursement Act works in practice, defenses based on other state and federal laws, and how to avoid claims being made.

About the Author: Raymond C. Walen, Jr. worked as a staff paralegal at Prison Legal Services of Michigan, Inc., from 1987 to 2008.

Prisoner Telephone Calling Rates: Update

As reported in the Spring 2014 edition of *Prisons and Corrections Forum*, on September 26, 2013, the Federal Communications Commission (FCC) released a *Report and Order and Further Notice of Proposed Rulemaking* on prisoner calling services, including interim rules.[1] The *Report and Order* included interim reforms of interstate (state-to-state) calling rates, requiring that providers' rates and charges be just, reasonable, and fair. Most of these rates took effect on February 11, 2014. Stayed on appeal by several telecoms were the rules on the safe-harbor rate caps, requiring cost-based rates, and requirements for annual reporting and certification. The September 26, 2013 *Report and Order* also required submission of data from providers on costs and usage, which were provided to the Commission in August 2014.

According to FCC Chair Tom Wheeler, the 2013 *Report and Order* has already resulted in positive changes in lower interstate rates and increased calling service usage. He notes, however, intrastate rates have increased in many states, and calling providers "are imposing an increasing array of ancillary charges."[2]

On October 17, 2014 the FCC adopted a *Second Further Notice of Proposed Rulemaking* in WC Docket No. 12-375, aiming at a comprehensive reform of the prisoner calling service system, including both interstate and intrastate rates.[3] The *Second Notice* sought comments on steps necessary to establish just, reasonable, and fair intrastate calling rates, and how to address site commission payments and ancillary charges. Among the topics: comment on the data submitted by calling service providers in August of 2014, which included cost data for jails and prisons of all sizes; whether rules should account for the differences in costs to serve different types of facilities; whether correctional institutions incur any costs in the provision of calling services and, if so, how facilities should recover such costs; and comment on a multi-year transition period to provide sufficient time for correctional facilities to adjust their budgets.

At the December 10, 2014 request of the FCC, and no party objecting, the Court has stayed the entire telecom appeal based upon the FCC's indication that its plan to comprehensively reform the prisoner calling system could moot or significantly alter the rules currently on appeal. The deadline for filing comments and replies following the *Second Notice* closed on January 5 and 20, 2015, respectively. Further action before the FCC is pending.

1 FCC, *In re Rates for Interstate Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking* (Sept. 26, 2013) WC Docket 12-375 (FCC 13-113), Appendix A, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-113A1.pdf (visited Apr. 23, 2015). The stay pending appeal was issued in *Securus Technologies, Inc., et al. v FCC*, DC Cir. No. 13-1280, Order, Jan. 13, 2013.

2 Correspondence, Tom Wheeler, FCC Chair, to U.S.Rep. Gus Bilirakis, Mar. 23, 2015, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-332941A1.doc (visited Apr. 23, 2015).

3 FCC, *In re Rates for Interstate Inmate Calling Services, Second Further Notice of Proposed Rulemaking* (Oct. 17, 2014) WC Docket 12-375 (FCC 14-158)

Michigan's Sex Offender Registry Act Ruled Unconstitutional In Part

On March 31, 2015 United States District Judge Robert Cleland struck down a number requirements in Michigan's Sex Offenders Registry Act (SORA) as are too vague and therefore unconstitutional. *See* Opinion and Order Resolving Motions for Judgment in *John Does #1-5 and Mary Doe v. Richard Snyder and Col. Kriste Etue,* Case No. 12-11194, March 31, 2015, Dkt. No. 103.

Among the provisions found unconstitutional are the 1,000-foot distance restriction from schools and several reporting requirements because they are too vague and result in offenders "over-policing" themselves and "over-reporting" information to err on the side of caution.

SORA was originally enacted in 1994, establishing a registry law of a confidential database containing information on offenders that was only accessible to law enforcement. The law was amended multiple times since then. It now categorizes offenders into three tiers, Tier I, Tier II and Tier III. Tier I offenders must register for 15 years, Tier II for 25 years, and Tier III for life, The registry is now publically available online.

The 73-page Opinion is currently available at no charge on the home page of the United States District Court for the Eastern District of Michigan, www.mied.uscourts.gov. Look for the link to *Selected New Judicial Opinions.*

Criminal Justice Policy Commission Established; Other CSG Efforts Stall

The Council of State Governments (CSG) was invited by Gov. Snyder and legislative leaders to study Michigan's sentencing system and conduct an exhaustive data-driven analysis of the courts, jail, probation, prison and parole. CSG's team held several hundred meetings and conference calls with stakeholders. Based on its findings, CSG provided policy options "to achieve more consistency and predictability in sentencing, stabilize and lower costs for the state and counties, and direct resources to reduce recidivism and improve public safety." [1] Among its key findings were:

- Large disparities in sentencing remain despite the sentencing guidelines. People with similar criminal histories who are convicted of similar crimes receive significantly different sentences.
- Because of the unusually large discretion given to Michigan's parole board, once a sentence is imposed it is unclear how much time the person will actually serve.
- Probation and parole resources are not prioritized to reduce recidivism.
- Policymakers do not have an effective mechanism to track sentencing and corrections outcomes.

The research is summarized in Council of State Governments Justice Center, *REPORT TECHNICAL APPENDIX: Compilation of Michigan Sentencing and Justice Reinvestment Analyses* (May 2014).

CSG initially recommended a long list of innovative recommendations that included:

1. Eliminate straddle cells;
2. Have the sentencing judge set a maximum period of incarceration specific to each individual case instead of defaulting to the statutory maximum;
3. Narrow the difference between minimum and maximum sentences;
4. Set probation and parole terms based on re-offense risk as measured by the PRV score;
5. Establish sanctions for probation and parole violations at the time of sentencing;

1 Council of State Governments Justice Center, *Applying a Justice Reinvestment Approach to Improve Michigan's Sentencing System: Summary Report of Analyses and Policy Options* (May 2014), p. 2.

Continued from page 7

6. Modify the use of habitual offender provisions so that the same prior offense cannot be counted both for purposes of charging the defendant as a habitual offender and scoring the prior record variable;
7. Restore the definition of habitual offender that counted only prior convictions arising from separate incidents (as opposed to multiple convictions from a single transaction);
8. Place limitations on the sanctions judges can impose for technical probation violations;
9. Establish a presumption of parole when someone has served the minimum sentence so long as they do not have a recent history of serious institutional misconduct and there is not objective, verifiable evidence that they pose a current risk to the public;
10. Establish a criminal justice policy commission to review the operation of the sentencing guidelines and other aspects of the criminal justice system.

After receiving critical feedback, CSG scaled down its recommendations substantially. Only items 6-10 were considered in the 2014 lame duck legislative session. Despite lengthy negotiations among stakeholders, most of these proposals were opposed by the Attorney General. They were watered down and eventually defeated. Only # 10 – establishment of a criminal justice policy commission – was ultimately adopted.

Rep. Joe Haveman had already introduced HB 5078 with dozens of co-sponsors from both parties. The goal was, at a minimum, to restore the sentencing commission that had been eliminated in 2002 so that the operation of the sentencing guidelines could be reviewed and changes could be recommended. The bill was redrafted in a stakeholder workgroup and the mandate was broadened substantially. CSG recommended additional refinements to what became HB 5928 and was then enacted as 2014 PA 465.

Now called the criminal justice policy commission, the new body's broadly worded charge includes the collection and analysis of data about:

- state and local sentencing and proposed release policies,
- the use of prisons and jails,
- the impact of the sentencing guidelines and other laws, rules and policies on the populations and capacities of correctional facilities and on recidivism.

The commission may recommend to the legislature modifications to any law, administrative rule or policy that affects sentencing or the use and length of incarceration.

The 17-member commission includes four legislators (a majority and minority party member from each chamber), a representative of the Attorney General and 12 members appointed by the Governor, most from names submitted by stakeholder organizations. In a press release issued on April 2nd, the following appointments were announced.

Four-year terms, expiring March 1, 2019:

Bruce Caswell, of Hillsdale, most recently served as a state senator representing the 16th District. He also served in the Michigan House of Representatives. Caswell is a retired teacher and superintendent. Caswell represents the general public and will chair the commission.

Stacia Buchanan, of Lansing, works with Mallory, Lapka, Scott & Stein, PLLC and was previously in private practice with Buchanan Law Office PLLC and Maddaloni & Associates, P.C. She represents criminal defense attorneys.

Kyle Kaminski, of Lansing, is the legislative liaison and chief of staff for the Michigan Department of Corrections, where he has worked since 2013. He represents the MDOC.

Raymond Voet, of Ionia, is a judge for the 64A District Court in Ionia County. He was first elected in 1998 after serving as prosecuting attorney for Ionia County. He represents district court judges.

Three-year terms, expiring March 1, 2018:

Sheryl Kubiak, of Milford, is a professor at Michigan State University. Her areas of specialty include jails and prisons, interpersonal violence and sexual assault, and mental health. She represents the Michigan Coalition to End Domestic and Sexual Violence.

Sarah Lightner, of Springport, is a Jackson County Commissioner representing District 1. She is a paralegal with experience in criminal defense, family law, bank-

ruptcy, and civil law. She represents the Michigan Association of Counties.

Jennifer Strange, of Traverse City, is a clinical social worker, in Kingsley, with the Michigan Department of Corrections. She is also a clinical therapist with Northern Lakes Community Mental Health. She represents the mental or behavioral health field.

Paul Stutesman, of Three Rivers, is chief judge of the 45th Circuit Court in St. Joseph County. He was first appointed in 2005, after spending a decade in private practice. Stutesman earned a bachelor's degree in political science and history from Western Michigan University and a law degree from DePaul University. He represents circuit court judges.

Two-year terms, expiring March 1, 2017:

D.J. Hilson, of Muskegon, is the Muskegon County prosecutor. Prior to his election, he spent 13 years as senior assistant prosecutor. He represents prosecuting attorneys.

Barbara Levine, of Grand Ledge, is associate director of the Citizens Alliance on Prisons and Public Spending. She is also a member of the governing council of the State Bar Prisons and Corrections Section. She represents advocates of alternatives to incarceration.

Larry Stelma, of Cedar Springs, is the Kent County Sherriff, where he has more than 40 years of law enforcement experience. He represents county sheriffs.

Andrew Verheek, of Grand Rapids, is a planner with the Kent County Office of Community Corrections and previously worked as a case manager for Kent County Friend of the Court. He represents the Michigan Association of Community Corrections Advisory Boards.

After the expiration of initial terms, appointees will serve four-year terms. Their appointments are not subject to the advice and consent of the Senate.

Bills regarding probation sanctions (HB 4137) and presumptive parole (HB 4138) have been reintroduced this session and are currently the focus of a legislative workgroup. There is still strong opposition from various stakeholders.

The Prisons And Corrections Section Of The State Bar Of Michigan

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Michigan's Virtual Prisons

By Peter J. Martel

Over the past three years the Michigan Department of Corrections (MDOC) has been housing state prisoners in county jails pursuant to an agreement initially authorized by Director's Office Memorandum (DOM) 2012-24.[1] In its initial version in 2012, the DOM was limited to including only those prisoners who were serving "flat" sentences. This typically meant that any individual who was serving his prison sentence in one of the participating county jails was most likely serving a two-year sentence for a felony firearm conviction. In the most recent DOM, however, the "flat" sentence requirement has been eliminated[2] and the state prisoners now being housed in these county jails are sometimes serving long, indeterminate sentences.[3]

This so-called "Virtual Prisons" program currently accounts for nearly 400 minimum-security state prisoners serving prison sentences in small, rural county jails. Participating counties include Clare, Clinton, Ingham, Iron, Jackson, Lenawee, Midland, Montmorency, Osceola, Ottawa, Roscommon, and Van Buren. The Michigan Criminal Justice Program of the American Friends Service Committee (AFSC) has followed many of the prisoners housed in these county jails. AFSC research shows that housing state prisoners in county jails creates a number of problems for those who are placed there for long periods of time. For most of these prisoners, conditions are more restrictive and more costly than for those serving their sentences at MDOC facilities. There is no access to parole board-recommended programs. Law library materials are not always available, and if they are, they are limited, nearly impossible, or even costly. There are no paid work opportunities. Commissary items and telephone calls are much more expensive. In some cases, prisoners and their families are charged a fee for visitation privileges. Access to recreation activities, fresh air and yard time, personal property, and even mail, are often more restrictive than one would find in a maximum-security MDOC facility.

Throughout the summer and fall of 2014 the AFSC directed Freedom of Information Act requests to each of these twelve counties regarding prisoners' access to law library materials and opportunities for prisoners to work. These requests also included copies of prisoner rulebooks regarding jail regulations and procedures, as well as policies and procedures regarding the local grievance procedure. Of the twelve counties, only Ingham and Jackson Counties did not respond. Ingham County simply never responded; Jackson County refused to respond with the requested documents, citing exemptions under the FOIA. The remaining counties responded, some more completely than others. The following is a summary of the responses that were received, along with supplemental information provided by individual prisoners in some areas.

Programming

None of the twelve counties provide any MDOC-recommended programming. DOM 2015-13 provides only that:

> Discharging prisoners housed in county jails will discharge directly from the jail. Prisoners serving sentences requiring Parole Board action will be returned to a CFA facility at a minimum of 12 months prior to their earliest release date to complete any required programs and subsequent Parole Board review.

Access to Law Libraries

Iron County only allows access to the State of Michigan library and prisoners are required to pay all costs associated with access to the materials. Montmorency County allows

1 MDOC Policy Directive 01.04.110 allows the Director of the MDOC to "issue a DOM instead of a policy directive to set forth new or revise existing policy." DOMs are only in effect for the year they are issued and must either be renewed or incorporated into policy in order to remain in effect. DOM 2012-24 was renewed in 2013 as DOM 2013-19, in 2014 as DOM 2014-13, and again in 2015 as DOM 2015-13.

2 DOM 2015-13, available at: http://www.michigan.gov/corrections/0,4551,7-119-1441_44369---,00.html.

3 At least one prisoner corresponding with the AFSC was serving a 15-30 year sentence.

access to law books provided by the jail, but also requires "payment for associated costs." Van Buren County provides:

> Inmates that request information from the law library will submit their request in writing to the jail sergeant or jail administrator. This request must be specific and include the statute that they are requesting.... Due to the fact that the law library is on a computer and is limited to the information available, some requests may have to be directed to the Prosecutor's Office to fulfill the request.

The prisoner is allowed the first twenty pages for free, but anything more than twenty pages is subject to reimbursement. None of the remaining participating counties provided any information about prisoners accessing law library materials. Prisoners housed at many of the non-responding facilities have complained they were not allowed access to law libraries or legal research materials.

Yard Time

Clinton County provides two hours of yard per week, "available as weather and staff permit." Montmorency County allows one hour daily out-of-cell movement "when possible," with "no less than three hours per week." Osceola County allows prisoners "to go to exercise yard (weather permitting) Mon-Fri at discretion of staff." Van Buren County allows "approximately 45 minute recreation periods" to all inmates. No other responding county provided any information about yard or recreation time.

Work Assignments

Clinton County indicated that prisoners could work within the jail and, in exchange, they would not be billed for room and board. Midland County provides working prisoners with additional meals and free haircuts. Montmorency and Van Buren Counties only allow work on a "voluntary" (unpaid) basis.

Visitation

Clinton County allows each prisoner one 30-minute visit per week. Iron County allows one 60-minute visit per week, but it must occur between noon and 4:00 p.m. on Saturday or Sunday, and visitors must be "identifiable" immediate family members (unless there are none in the area, in which case a "close friend" may visit). Midland County allows prisoners to have one 20-minute visit per week. Montmorency County allows 60-minute visits, but contact visits are only allowed for trustee-status inmates. Osceola County allows one 30-minute visit per week, though visiting hours are restricted to 9-11 a.m. on Saturdays and Sundays, 1-4 p.m. on Saturdays, and 5:30-8 p.m. on Saturdays and Sundays. Van Buren County allows four video visits per week.

Prisoners who wrote to the AFSC from Ingham County (on 3" x 5" post cards, because that is all they are allowed for sending or receiving mail) reported that there is no law library, no contact visits, and visits are limited a 25-minute video visits. Health care visits require $25 co-pays. Telephone calls cost $15 for a 15-minute call. There is no access to paid work opportunities and there are no opportunities to go outdoors.

In conclusion, it appears from the information collected by the AFSC that those housed at county facilities live in conditions that appear unrewarding for the good behavior that is required to be a Level I prisoner, though this is a requirement for being sent to a county jail under this agreement.

The material received by the AFSC in response to the FOIA requests and described here substantially corroborates reports by individual prisoners. The AFSC will continue to gather information on the conditions of confinement in these county jails. Individuals interested in learning more about this agreement should feel free to contact the AFSC's Michigan Criminal Justice Program at (734) 761-8283.

About the Author: Peter Martel is Program Associate of the Michigan Criminal Justice Program of the American Friends Service Committee (AFSC). The Program provides information and resources at its website: www.prisoneradvocacy.org.

Prisoner Observation Aides In Mental Health Settings

The Department of Corrections has revised its Policy Directive on Suicidal and Self Injurious Behavior to incorporate its relatively new Prisoner Observation Aide Program (POA). PD 04.06.115, paras. V-AA (effective 04/20/15). The program's inclusion in policy follows over a year operating pursuant to Director's Office Memoranda. *See* DOM 2015-19.

Under the policy, prisoners who may be suicidal or intending to injure themselves must remain in an observation room under the direct and continuous observation of staff until mental health staff evaluate the prisoner and develop a management plan that reduces the prisoner's suicide risk level that is implemented.

Michigan's POA program follows the practice in the Federal Bureau of Prisons using specially-selected and trained prisoners to observe prisoners on observation status rather than relying on staff. As explained in DOM 2015-19, in addition to cost savings, studies suggest a suicidal or self-injurious prisoner may be more willing to talk with another prisoner, one who has a greater ability to cope while incarcerated, about motivational factors relating to the behavior. This may result in decreased episodes of suicidal or self-injurious behavior.

Similar to the Federal Bureau of Prisons, the Program uses specially selected and trained prisoners to observe suicidal or self-injurious prisoners. They may also be used to observe prisoners in a mental health setting who are ordered by a psychiatrist to remain under one-on-one direct observation for other reasons. DOM 2015-19.

Prisoners selected for the program are classified as a Prisoner Observation Aide or an alternative work classification with the same responsibilities as the POA classification. They are selected based on their ability and willingness to provide the service and for their emotional stability, reliability, and credibility with both prisoners and staff. They are paid at the highest daily rate of the Advanced Education or Training Pay Scale (*i.e.*, $3.24) for each 24-hour period. PD 04.06.115, para. V.

The responsibility for their training is that of the Corrections Facilities Administration Deputy Director in conjunction with the administrator of the Bureau of Health Care Services. The training includes responsibilities as an observer, record-keeping, handling emergencies, basic communication skills, active listening skills, and maintaining confidentiality. Training is required before the work can begin, with follow-up training provided at least annually. *Id.*, para. W.

Each institution that has a POA program has a POA program committee to manage it. It is composed of the Classification Director and a staff member designated by the Warden, plus a Qualified Mental Health Professional designated by the Warden in consultation with the Mental Health Services Unit Chief. The POA committee screens and selects program candidates and removes them from the assignment, and ensures that adequate observation coverage is available. *Id.*, para. X.

Observer Aides will ordinarily work a three-hour shift, and except under unusual circumstances, will not work more than six hours in a 24-hour period. They are required to maintain unrestricted one-on-one visual observation of the prisoner being observed at all times. Although the Observer Aide may communicate with the prisoner being observed, the Aide is not to counsel or give advice to the prisoner. Observer Aides are not to be provided access to medical, psychiatric, or commitment files, or other confidential information regarding the prisoner being observed. *Id.*, para. Z.

Observer Aides work under the supervision of staff in the immediate area of the observation room. The Aides document their visual observations of the prisoner every 15 minutes in a POA documentation report, including any unusual or significant event as it occurs. Custody staff review and initial the report as they make their required 15 minute rounds. Staff are to be notified if the Observer Aide sees that the prisoner being observed is in apparent distress or engaging in self-injurious or other behavior that may indicate the need for staff intervention. At the end of each session, the Observer Aide meets with designated unit staff for debriefing. Staff are responsible for providing subsequent Observer Aides with information regarding any concerns raised during the prior observation session. *Id.*, para. AA.

Current MDOC Policy Directives are available online at the Department's website: http://www.michigan.gov/corrections/0,4551,7-119-1441_44369---,00.html.

Michigan Probate Courts Scarcely Utilize Assisted Outpatient Treatment

The Assisted Outpatient Treatment (AOT) law, also known as "Kevin's Law"[1] in Michigan, took effect in 2005, creating a new treatment option for individuals with severe mental illness not receiving or complying with recommended mental health treatment.[2]

Under the Act, an individual can be ordered by a probate court judge to receive AOT if the person qualifies as a "person requiring treatment" under the Mental Health Code as expanded by the law to include those who are mentally ill and noncompliant with recommended mental health treatment when noncompliance has previously resulted in hospitalization, incarceration, or violent threats or actions.[3] If the criteria are met, the subject can be ordered to undergo outpatient treatment for up to 180 days, *without* a finding of imminent threat to self or others, as is often the case in other court orders for psychiatric treatment.[4]

The intent of the law is to help those whose illness has temporarily impaired their understanding of the need for treatment. It allows families and friends to petition the court to order appropriate outpatient mental health care, thereby reducing the risk of adverse events for both the individual and the community. When ordered, AOT is a comprehensive array of mental health services and support that are individually tailored to the needs of each individual and provided through the local Community Mental Health Services Program (CMHSP).[5]

AOT is another tool that can be used with difficult cases and requires a lesser civil commitment standard than requiring imminent danger. Yet, in the ten years since becoming law, AOT has scarcely been used. This is the finding of the Mental Health Association in Michigan (MHAM) after its recent investigation of the application of AOT across the state.[6] Published in March 2015, the Report describes the use, knowledge, attitudes, and perceptions of AOT around the state based upon a comprehensive state-wide survey of the two key participants in local implementation of the law: all 83 Probate Courts and all 46 Community Mental Health Services Programs (CMHSPs).

The primary reason given for it not using the law was that it is too complex and confusing. There were also concerns from the CMHSPs that compliance was too difficult to enforce, and that the existing civil commitment tool in alternative treatment orders (initial hospitalization followed by community care) are potentially preferable.[7]

Recommendations for improving utilization of AOT include: revising the law for greater clarity; improving training efforts, including for family members through their local NAMI-Michigan chapters; persuading the CMHSPs of the importance of AOT and the critical role their services can play in it; establishing needed legislative appropriations; overcoming confusion about using court orders as opposed to Medicaid "medical necessity" criteria or local mental health eligibility guidelines; and formal evaluation of results.[8]

1 So-named for the 2000 fatal beating of Kevin Heisinger in the bathroom of a Kalamazoo bus station by a schizophrenic who was not following his mental-health treatment.

2 It was created in a package of four legislative bills, Public Acts 496-499 of 2004, amending the Michigan Mental Health Code.

3 Governor Granholm Signs Kevin's Law, Creates New Treatment Options for Mentally Ill, Dec. 29, 2004, available at: http://michigan.gov/formergovernors/0,4584,7-212-57648_ 21974-107105--,00.html (visited Apr. 23, 2015).

4 2015 MHAM Report, p.1.

5 Governor Granholm Signs Kevin's Law, n. 3.

6 2014 Survey of Michigan Probate Courts and Community Mental Health Services Programs Regarding Assisted Outpatient Treatment ("Kevin's Law"), March 2015 (Report), available at: http://mipic.org/AOT_REPORT_FINAL_II_ABSOLUTE.pdf (visited Apr. 23, 2015).

7 *Id.* at 5-6.

8 *Id.* at 8.

Sixth Circuit Case News: The Preclusive Effect of Prison Misconduct Hearings

In *Peterson v. Johnson*, 714 F.3d 905 (6th Cir. 2013), the court held that federal courts should give preclusive effect to the fact-finding of prison misconduct hearings. *Peterson* relied on *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), which used a four-part test for courts to determine if a state administrative hearing is sufficiently "judicial" to be binding on federal courts in subsequent § 1983 actions.

The four *Elliott* factors are: (1) that the state agency acted in a judicial capacity; (2) that the hearing officer resolved a disputed issue of fact that was properly presented; (3) that the party to be precluded had an adequate opportunity to litigate the factual dispute; and (4) if 1-3 are satisfied, then the federal court must give the fact-finding the same preclusive effect it would have in that state's courts. *Id.* at 913. Obviously #3 is the key factor in applying this test in the prison setting.

Until *Peterson*, no published Sixth Circuit case had ever held that prison fact-finding hearings should be given preclusive effect. *Id.* at 911-912. *Peterson* was an unusual case because the plaintiff in the Sixth Circuit was acting *pro se*. In short, the court turned the law 180 degrees in a published opinion without the benefit of a lawyer's brief for the prisoner-plaintiff's side, either in the district court or on appeal. Indeed, because the court disposed of the case under Sixth Circuit rules that excuse the state from filing a response brief in some *pro se* cases, the Sixth Circuit had no lawyer's brief on the issue from *either* side! (The lack of attorney input was compounded by the fact that neither the Michigan Court of Appeals nor the Michigan Supreme Court had ever decided whether or not prison disciplinary hearings should have preclusive effect in Michigan courts. *Id.* at 913-914.)

Fortunately, in *Roberson v. Torres*, 770 F.3d 398 (6th Cir. 2014), another Sixth Circuit panel has since read *Peterson* narrowly:

> *Peterson* is not a blanket blessing on every factual finding in a major-misconduct hearing. Although the language of ... *Peterson* is at times categorical, our decision to accord preclusive effect to particular findings from Peterson's prison hearing necessarily turned, at least in part, on the particular circumstances of Peterson's case. Indeed, the question of preclusion cannot be resolved categorically, as it turns on case-specific factual questions such as what issues were actually litigated and decided, and whether the party to be precluded had sufficient opportunity to do so – not just in theory, but in practice. It likewise turns on the court's "sense of justice and equity," [citation omitted], which may require a case-by-case analysis of surrounding circumstances."

Roberson, at 404-405. *Roberson* should give prisoners the ability to challenge *Elliott* factor #3 – "the adequacy of their opportunity to litigate the factual dispute" – anew in every case.

Prisons and Corrections Section Mission

The Prisons and Corrections Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, its website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan.

Recent Policy Positions

The Section has taken the following positions for bills introduced in the 2015-2016 Legislative Session:

House Bill 4069: Support and Amend. The Section supports the expansion of HYTA to individuals aged 21 through 24. However, the Section believes the bill should be amended to remove the provisions that (1) the prosecutor must approve assignment under HYTA for individuals aged 21 through 24, and (2) that an individual, regardless of age, can only be assigned to HYTA one time. Both provisions severely limit judicial discretion.

House Bills 4080-4081: Oppose the creation of the Stalker Offender Registration Act

House Bill 4083: Oppose: The definition of "gang" and "gang member" are so broad and vague that HB 4083, if passed and enacted, would likely criminalize behavior of individuals not actually a member of a gang. In addition, there are serious implications to a person's constitutional rights of freedom of association and freedom of speech, while also creating a status offense.

House Bill 4135: Oppose: This bill limits judicial discretion. Revocation on the listed grounds is likely already occurring and thus the bill seems aimed at solving a problem that does not exist. Nonetheless, there also are mitigating circumstances where the revocation of HYTA ought not occur, especially when the new offense is a misdemeanor, and judges should retain the discretion to keep the defendant on HYTA status to accommodate those circumstances.

Senate Bill 151: Support the elimination of the sunset on the filing deadline for filing a petition seeking review of DNA evidence.

Senate Bill 191: Oppose: SB 191 appears both premature and redundant after the Legislature's amendment of MCL 769.1k, following the Michigan Supreme Court's decision in *People v. Cunningham*, 496 Mich. 145 (2014). In addition, SB 191 could exacerbate the already-existent problem of debtor's prisons in Michigan.

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